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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAELECTRONIC FRONTIER  
FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. 15-cv-03186-MEJ**ORDER RE: CROSS MOTIONS FOR  
SUMMARY JUDGMENT**

Re: Dkt. Nos. 19, 23

**INTRODUCTION**

Plaintiff Electronic Frontier Foundation (“EFF”) filed this lawsuit under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the release of records from the Drug Enforcement Administration (“DEA”), a component of Defendant United States Department of Justice (“DOJ”) (collectively “the Government”). Compl. ¶ 1, Dkt. No. 1. Pending before the Court are the parties’ cross motions for summary judgment. Gov’t Mot., Dkt. No. 19; EFF Mot., Dkt. No. 23. Having considered the parties’ positions, the relevant legal authority, and the record in this case, the Court **GRANTS IN PART** and **DENIES IN PART** the Government’s Motion and **GRANTS IN PART** and **DENIES IN PART** EFF’s Motion as set forth below.

**BACKGROUND**

On February 5, 2014, EFF submitted a FOIA request to the DEA for records pertaining to the “Hemisphere” program. Compl. ¶ 1; Declaration of Katherine L. Myrick (“Myrick Decl.”), Ex. A (“FOIA Request”), Dkt. No. 21. EFF alleges Hemisphere is a partnership between telecommunications provider AT&T and law enforcement officials, including the DEA, that allows law enforcement to access detailed phone records and conduct complicated analysis and data mining of those records. *Id.* (both). The *New York Times* first reported on Hemisphere’s existence on September 1, 2013. EFF Mot. at 1 (citing Scott Shane & Colin Moynihan, *Drug*

1 *Agents Use Vast Phone Trove, Eclipsing N.S.A.* 's, N.Y. Times (Sept. 1, 2013,  
2 <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html>)).  
3 The program involves the placement of AT&T employees within law enforcement facilities to  
4 assist law enforcement access trillions of Americans' electronic call detail records (CDRs) dating  
5 back to 1987. *Id.* at 2. CDRs contain a phone user's dialing, routing, and location information.  
6 *Id.*; *see also* Declaration of Jennifer Lynch ("Lynch Decl."), Ex. 1 (Hemisphere Summary), Dkt.  
7 No. 23-1.

8 EFF's FOIA request specifically sought the following about Hemisphere:

- 9 1. Any and all DEA or DOJ memoranda, policies, procedures, forms,  
10 training and practice manuals concerning the "Hemisphere" program;
- 11 2. The case name, docket number, and court of all criminal  
12 prosecutions, current or past, in which officers and agents used the  
"Hemisphere" program to obtain records or data;
- 13 3. Any communications or discussions with AT&T or any other  
14 telecommunications providers concerning technical or legal  
15 difficulties the DEA or DOJ has encountered in obtaining records  
16 and data through "Hemisphere;"
- 17 4. Any communications or discussions between DEA or DOJ and other  
18 law enforcement agencies, including, but not limited to  
19 Immigrations and Customs Enforcement ("ICE"), the Federal  
20 Bureau of Investigation ("FBI"), state and local law enforcement  
21 agencies, and fusion centers related to coordinating or managing the  
22 "Hemisphere" program or any data obtained through "Hemisphere;"
- 23 5. Any DEA or DOJ contracts or compensation agreements with  
24 AT&T or any other telecommunications provider concerning the  
"Hemisphere" program;
- 25 6. Any DEA or DOJ contracts or compensation agreements with fusion  
26 centers or local law enforcement agencies to manage or coordinate  
27 the "Hemisphere" program and any data obtained through  
28 "Hemisphere"; and
- 29 7. Any briefings, discussion, or other exchanges between DEA or DOJ  
30 officials and members of the Senate or House of Representatives  
concerning the existence and operation of "Hemisphere."

31 FOIA Request at 2.<sup>1</sup>

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32 <sup>1</sup> EFF requested expedited processing under 5 U.S.C. § 522(a)(6)(E)(v)(II) and 28 C.F.R. §§  
33 16.5(d)(1)(ii) and (iv), citing a "compelling need," an "urgency to inform the public about an

1       Between March 2014 and June 2014, the parties exchanged communications during which  
2 EFF reformulated and narrowed its request in response to the DEA's requirements. *See* Myrick  
3 Decl., Ex. D (DEA letter to EFF). Among other things, EFF limited the search to (1) the DEA  
4 Headquarters in Springfield, Virginia, and the Los Angeles, San Diego, and San Francisco field  
5 divisions; (2) records between 2008 and the present; (3) with regard to Item 2, criminal records  
6 contained within the DEA's Investigative Reporting and Filing System; and (4) with regard to  
7 Item 6, communications, discussions, contracts or compensation agreements between the DEA  
8 offices identified above and six specific fusions centers. Myrick Decl., Ex. E (EFF's  
9 Reformulated FOIA Request). In responses dated May 13, 2014 (*id.* ¶ 14, Ex. F (DEA's first  
10 response)), and April 7, 2015 the DEA informed EFF it would release 176 pages and withhold 132  
11 pages based on FOIA Exemptions 5, 6, 7(A), 7(C), 7(D), 7(E), and (7)(F). *Id.* ¶ 15, Ex. M (DEA's  
12 Apr. 7 response). EFF filed an administrative appeal with the DOJ's Office of Information Policy  
13 ("OIP") on April 28, 2015. Second Myrick Decl., Ex. A, Dkt. No. 26. OIP affirmed the DEA's  
14 withholding on July 10, 2015. *Id.*, Ex. B.

15       On July 9, 2015, EFF filed the present lawsuit. *See* Compl. The DEA subsequently  
16 prepared a draft *Vaughn* Index as part of its meet and confer with EFF. Myrick Decl. ¶ 16. On  
17 December 24, 2015, the DEA released to EFF portions of 13 pages it previously withheld in full.  
18 *Id.* ¶ 17. Following the meet and confer process, the parties no longer dispute employee  
19 identifying information withheld under Exemptions 6, 7(C), and 7(F). EFF Mot. at 1 n.1; *see also*  
20 Scharf Decl., Ex. B (EFF's e-mail response to the Government identifying the disputed  
21 documents), Dkt. No. 20; Gov't Mot. at 12.

22       The Government then filed its Motion for Summary Judgment, asserting the DEA  
23 conducted an adequate search and properly withheld responsive documents protected by the FOIA  
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25 actual or alleged federal government activity," and "widespread and exceptional media interest in  
26 which there exist possible questions about the government's integrity which affect public  
27 confidence." FOIA Request at 2-5. EFF also requested that it not be charged search or review  
28 fees as a representative of the news media pursuant to FOIA and 28 C.F.R. § 16.11(b)(6), and  
stated that it was entitled to a waiver of duplication fees because disclosure of the requested  
information is in the public interest under 5 U.S.C. § 552(a)(4)(a)(iii) and 28 C.F.R. §  
16.11(k)(1)(i), (ii). *Id.* at 5-7. The DEA denied EFF's request for expedited processing, but  
granted its request for a fee waiver or reduction of fees. Myrick Decl. ¶¶ 9-11.

1 Exemptions. Gov't Mot. at 2; *see also* Myrick Decl., Ex. O ("Vaughn Index"). EFF filed a cross-  
2 Motion for Summary Judgment, disagreeing with DEA's claimed exemptions and seeking  
3 information from seven documents withheld under Exemption 5, plus 27 documents withheld or  
4 redacted under Exemption 7. EFF Mot. at 6, 12; Gov't Reply at 11, Dkt. No. 25.

5 Since the parties filed their Motions, the Court ordered two rounds of supplemental  
6 briefing, and the parties have timely responded. The Government also filed a Statement of Recent  
7 Decision (Dkt. No. 39), attaching an Opinion by Judge Emmet G. Sullivan in *Electronic Privacy*  
8 *Information Center v. United States Drug Enforcement Agency* ("EPIC"), 2016 WL 3557007  
9 (D.D.C. June 24, 2016). EPIC considers some of the same documents and exemptions at issue in  
10 this action. However, as of the date of this Order, the briefing in that case is still ongoing, and  
11 Judge Sullivan appears to be conducting further review of the evidence in that matter. For clarity,  
12 this Court ordered the Government to indicate which documents were at issue in both cases and  
13 which Exemptions it asserted in EPIC for each of those documents. Order, Dkt. No. 40. Based on  
14 the Government's response, it appears that in some instances the Government applied different  
15 Exemptions to the same documents in this case and the EPIC case. *See* Third Myrick Decl., Ex. B  
16 (chart), Dkt. No. 43. EFF argues these inconsistencies demonstrate the need to "independently  
17 check" the Government's withholding decisions. EFF Fifth Suppl. Resp. at 3, Dkt. No. 45.

#### 18 **LEGAL STANDARD**

19 FOIA's "core purpose" is to inform citizens about "what their government is up to." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012), *overruled on other*  
20 *grounds by Animal Legal Defense Fund v. U.S. Food & Drug Admin.* ("Animal Legal"), 836 F.3d  
21 987 (9th Cir. 2010) (internal quotation marks omitted). This purpose is accomplished by  
22 "permit[ting] access to official information long shielded unnecessarily from public view and  
23 attempt[ing] to create a judicially enforceable public right to secure such information from  
24 possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973), *superseded on other*  
25 *grounds by statute as recognized in Islamic Shura Council of S. Cal. v. F.B.I.*, 635 F.3d 1160,  
26 1166 (9th Cir. 2011). Such access "ensure[s] an informed citizenry, vital to the functioning of a  
27 democratic society, needed to check against corruption and to hold the governors accountable to

1 the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation  
2 marks omitted). Congress enacted FOIA to “clos[e] the loopholes which allow agencies to deny  
3 legitimate information to the public.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 150  
4 (1989) (internal quotation marks and edits omitted).

5 At the same time, FOIA contemplates that some information can legitimately be kept from  
6 the public through the invocation of nine “Exemptions” to disclosure. *See* 5 U.S.C. § 552(b)(1)-  
7 (9). An agency may withhold only information to which the asserted Exemption applies and must  
8 provide all “reasonably segregable” portions of that record to the requester. 5 U.S.C. § 552(b).  
9 “These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the  
10 dominant objective of the Act.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*  
11 (“*Klamath*”), 532 U.S. 1, 7-8 (2001) (internal quotation marks omitted). “Consistently with this  
12 purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure  
13 places the burden on the agency to justify the withholding of any requested documents.” *U.S.*  
14 *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991); *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987)  
15 (agency seeking to withhold information has burden of proving the information falls under the  
16 claimed Exemption).

17 The usual question raised in FOIA litigation is, as here, whether the information withheld  
18 by the government properly falls within the scope of the asserted exemptions. “Most FOIA cases  
19 are resolved by the district court on summary judgment, with the district court entering judgment  
20 as a matter of law.” *Animal Legal*, 836 F.3d at 989 (citation omitted). Trial courts review  
21 summary judgment motions in FOIA actions under a *de novo* standard, in line with Federal Rule  
22 of Civil Procedure 56(c).<sup>2</sup> *Id.*; 5 U.S.C. § 552(a)(4)(B) (a reviewing court “shall determine the

23  
24 <sup>2</sup> Additionally, not all FOIA cases may be resolved on summary judgment. “[S]ome FOIA cases  
25 require resolution of disputed facts.” *Animal Legal*, 836 F.3d at 989 (citing *GC Micro Corp. v.*  
26 *Def. Logistics Agency*, 33 F.3d 1109, 1110 (9th Cir. 1994) (requiring a factual determination of  
substantial competitive harm)). If a factual determination needs to be made, summary judgment is  
not appropriate. *Id.* at 990. The Ninth Circuit also held that

27 [c]onsistent with our usual procedure, if there are genuine issues of  
28 material fact in a FOIA case, the district court should proceed to a  
bench trial or adversary hearing. Resolution of factual disputes  
should be through the usual crucible of bench trial or hearing, with

1 matter de novo, and may examine the contents of such agency records in camera to determine  
2 whether such records or any part thereof shall be withheld under any of the exemptions . . . , and  
3 the burden is on the agency to sustain its action.”).

4 The *de novo* standard requires courts to determine whether there are any genuine issues of  
5 material fact. *Animal Legal*, 836 F.3d at 989. To carry their burden on summary judgment,  
6 “agencies are typically required to submit an index and ‘detailed public affidavits’ that, together,  
7 ‘identify[ ] the documents withheld, the FOIA exemptions claimed, and a particularized  
8 explanation of why each document falls within the claimed exemption.’” *Yonemoto*, 686 F.3d at  
9 688 (edits in original) (quoting *Lion Raisins v. Dep’t of Agric.*, 354 F.3d 1072, 1082 (9th Cir.  
10 2004)). “These submissions—commonly referred to as a *Vaughn* index—must be from ‘affiants  
11 [who] are knowledgeable about the information sought’ and “detailed enough to allow [a] court to  
12 make an independent assessment of the government’s claim [of exemption].”” *Id.* (edits in  
13 *Yonemoto*) (quoting *Lion Raisins*, 354 F.3d at 1079; 5 U.S.C. § 552(a)(4)(B)). While the *Vaughn*  
14 index need not “disclose facts that would undermine the very purpose of its withholding, . . . it  
15 should reveal as much detail as possible as to the nature of the document, without actually  
16 disclosing information that deserves protection.” *Id.* (internal quotation marks omitted). Courts  
17 “accord substantial weight to an agency’s declarations regarding the application of a FOIA  
18 exemption.” *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012) (citing *Hunt v. CIA*, 981 F.2d  
19 1116, 1119-20 (9th Cir. 1992)).

20 However, while “the [agency’s] reasons are entitled to deference, the [agency’s]  
21 declarations must still describe the justifications for nondisclosure with reasonably specific detail,  
22 demonstrate that the information withheld logically falls within the claimed exemptions, and show  
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24 evidence subject to scrutiny and witnesses subject to cross-  
25 examination. The district court must issue findings of fact and  
26 conclusions of law. Fed. R. Civ. P. 52(a)(1). Our review remains  
27 the same as in all civil cases: we review the findings of fact for clear  
28 error and the conclusions of law *de novo*. *See OneBeacon Ins. Co.  
v. Haas Indus., Inc.*, 634 F.3d 1092, 1096 (9th Cir. 2011).

1 that the justifications are not controverted by contrary evidence in the record or by evidence of  
2 [the agency's] bad faith. The [agency] must do more than show simply that it has acted in good  
3 faith." *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007) (internal quotation marks and  
4 citations omitted); *see also Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) ("[T]he government  
5 'may not rely upon conclusory and generalized allegations of exemptions.'" (quoting *Church of*  
6 *Scientology v. Dep't of the Army* ("*Church of Scientology I*"), 611 F.2d 738, 742 (9th Cir. 1980))).  
7 Indeed, *de novo* review has been "deemed essential to prevent courts reviewing agency action  
8 from issuing a meaningless judicial imprimatur on agency discretion." *Animal Legal*, 836 F.3d at  
9 990 (quoting *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999)). Moreover, "[a] basic policy of  
10 FOIA is to ensure that Congress and not administrative agencies determines what information is  
11 confidential." *Lessner v. U.S. Dep't of Commerce*, 827 F.2d 1333, 1335 (9th Cir. 1987). As such,  
12 courts do not defer to a federal agency's determination that the requested information falls under a  
13 particular FOIA exemption. *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1127 (9th Cir. 2007).

## 14 DISCUSSION

15 As an initial matter, EFF has not challenged the adequacy of the DEA's search. *See* Gov't  
16 Mot. at 3 (noting EFF never challenged the reasonableness of the search during the meet and  
17 confer process); Declaration of James A. Scharf ("Scharf Decl."), Ex. B (EFF's e-mail response to  
18 the DEA, only challenging FOIA Exemptions), Dkt. No. 20. The Court is satisfied the DEA's  
19 search was sufficient.<sup>3</sup> Accordingly, the only issue remaining is whether the Government properly  
20 withheld documents under Exemptions 5, 7(A), 7(D), and 7(E). The Court discusses each asserted  
21 Exemption below.

### 22 A. Exemption 5

23 Exemption 5 permits withholding of "inter-agency or intra-agency memorandums or letters

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25 <sup>3</sup> In responding to EFF's reformulated FOIA request, the DEA searched six offices likely to have  
26 responsive records within the DEA Headquarters, as well as the Los Angeles, San Diego, and San  
27 Francisco divisions. Myrick Decl. ¶¶ 19-31. It also searched the Narcotics and Dangerous Drugs  
28 Information System, and the index to the Investigative Reporting and Filing System. *Id.* ¶ 32. It  
returned responsive documents to the FOIA Unit, except those documents that it withheld under  
specific FOIA exemptions. *Id.* ¶¶ 19-34; *see Vaughn* Index.

which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption extends only to documents that are “normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (footnote omitted). This includes documents covered by the attorney-client privilege (“ACP”), the attorney work-product rule (“WP”), and the deliberative process privilege (“DPP”). *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997). In keeping with FOIA’s goal of disclosure, Exemption 5 is narrowly construed. *Klamath*, 532 U.S. at 8.

EFF’s chart summarizes the documents withheld under Exemption 5:

Index #	Page #	Document Description <sup>[4]</sup>	ACP	WP	DPP
1	1-12	E-mails with attachments among federal staff including a Deputy Assistant Attorney General addressing Hemisphere legal issues	x	x	x
4	16-27	Draft memorandum by the DEA’s Office of Chief Counsel about Hemisphere legal issues.	x	x	x
6	31-34	Record about how to use Hemisphere capabilities			x
7	35-36	Record about how to use Hemisphere			x
25	110	E-mails in May 2007 about legal issues about Hemisphere and subpoenas		x	
27	253-54	E-mails within the DEA including attorneys in November 2007 about Hemisphere Subpoenas	x	x	
32	267-68	E-mails in June 2008 about a draft Hemisphere policy			x

EFF Mot. at 7; *but see* Myrick Decl. ¶¶ 42-43 (initially indicating Documents 28 and 33 are disputed, not Documents 27 and 32); *compare* Joint Resp. re: Order for Clarification ¶ 2, Dkt. No. 32 (indicating Document 27 (pages 253-54) is in dispute) & *see* Gov’t Reply (indicating Documents 28 and 33 are disputed); *see also* Vaughn Index at 86 (Document 28 does not include Exemption 5 assertions) and 104 (Document 33 does not include Exemption 5 assertions).<sup>5</sup>

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<sup>4</sup> These descriptions correspond with the Government’s descriptions in its draft Vaughn Index.

<sup>5</sup> This sort of inattention and incorrect citations has caused the Court to waste considerable time and resources checking and rechecking the documents at issue in this action.

EFF first argues the DEA has not established that Documents 4, 6, 7, 25, and 32 are “inter-agency” or “intra-agency” communications that qualify for protection under Exemption 5’s “inter-agency or intra-agency memorandums or letters” protections. EFF Mot. at 7-8; *see* 5 U.S.C. § 552(b)(5). EFF does not challenge Documents 1 and 27 on this ground, where the Government alleged the authors and recipients of the communications are attorneys and employees within the federal Government or the DEA. EFF Mot. at 8; *see* Myrick Decl. ¶¶ 37, 42; *Vaughn* Index at 1, No. 1 (alleging the communication was “among federal government employees”); *id.* at 83, No. 27 (alleging the communication was “internal-DEA”). But EFF contends the DEA’s silence as to Documents 4, 6, 7, 25, and 32 “speaks volumes”—particularly in contrast with the affirmative inter- and intra-agency allegations in support of Documents 1 and 27. EFF Mot. at 8. EFF asserts the DEA has “withheld five records under Exemption 5 without alleging, let alone proving, they were not shared outside the executive branch[,]” and Exemption 5 does not extend to communications outside the federal government. *Id.* at 7 (citing *Ctr. for Int’l Envtl. Law v. Trade Representative*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002)). In support of its challenge, EFF cites various news articles and previously disclosed documents indicating that Hemisphere involves many parties outside the federal government, including state and local police and private corporations, and that communications related to Hemisphere have been shared outside the federal government. *Id.* at 8 (citations omitted). In response, the Government argues these documents fit under the “consultant corollary,” which holds that documents prepared for a government agency by an outside consultant qualify as an “intra-agency” communication where the consultant has no other interest other than the agency. Gov’t Reply at 4 (citing *Klamath*, 532 U.S. at 2).

Under 5 U.S.C. §§ 551(1) and 552(f), “agency” means each authority of the Government of the United States” and “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” Documents prepared for a Government agency by an outside consultant may qualify as intra-agency communication where “the consultant does not represent an interest of its own, or the interest of any other client,” while advising the agency. *Klamath*, 532 U.S. at 11. These

1 documents “play[] essentially the same part in an agency’s process of deliberation as documents  
2 prepared by agency personnel[.]” *Id.* Whether a document is an inter- or intra-agency  
3 communication is a fact-specific inquiry. *Elect. Frontier Found. v. Office of the Dir. of Nat’l*  
4 *Intelligence* (“*EFF I*”), 639 F.3d 876, 890 (9th Cir. 2010).

5 Having reviewed the Government’s supporting evidence, the Court finds it has raised a  
6 genuine question of fact as to whether Document 4 qualifies as an “inter-agency” communication.  
7 The Government indicates Document 4 is “a draft memorandum prepared by an attorney in the  
8 DEA Office of Chief Counsel” and “contains a draft of confidential legal advice to DEA.” Myrick  
9 Decl. ¶ 38. Thus, Document 4 appears to be a communication shared by employees within the  
10 federal government, specifically the DEA.

11 Documents 6, 7, 25, and 32 are less clear. The Government’s supporting declaration and  
12 *Vaughn* Index describe them as follows:

- 13 • “Document 6 . . . is undated and concerns Hemisphere, Hemisphere’s capabilities,  
14 and how to use Hemisphere.” Myrick Decl. ¶ 39. The “author [is] not indicated.”  
15 *Id.*; *Vaughn* Index at 19, No. 6.
- 16 • “Document 7 . . . is undated and concerns how to use Hemisphere.” Myrick Decl. ¶  
17 40. “No author [is] indicated.” *Id.*; *Vaughn* Index at 24, No. 7.
- 18 • “Document 25 . . . is an e-mail dated May 2007, concerning legal issues related to  
19 the use of Hemisphere and subpoenas” and “was initiated by a DEA attorney.”  
20 Myrick Decl. ¶ 41. No recipient is identified. *See id.*; *see also Vaughn* Index at 75,  
21 No. 25.
- 22 • Document 32 “consists of e-mails dated June 2008, entitled ‘DRAFT Operation  
23 Hemisphere Policy.’” Myrick Decl. ¶ 43.<sup>6</sup> No author or recipient is identified. *See*  
24 *id.*

25 The Government tacitly acknowledges these documents may have been shared outside the  
26 federal government but argues the consultant corollary still applies. Gov’t Reply at 4. But the  
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28 <sup>6</sup> As noted earlier, the Myrick Declaration identifies this Document as Document 33, not 32. *See*  
Myrick Decl. ¶ 43.

1 Government has not provided any evidence in support of its consultant corollary theory. There is  
2 no indication of who these alleged consultants were or how they are related to the materials  
3 communicated. Indeed, except for Document 25, the Court cannot even determine who wrote or  
4 received these documents. The Government's *Vaughn* Index and its supporting declarations fail to  
5 provide information sufficient for the Court to assess the Government's consultant corollary  
6 theory or to fully assess whether these documents might otherwise constitute "inter-agency" or  
7 "intra-agency" communications. Without more, the Court cannot find that Documents 6, 7, 25,  
8 and 32 are "inter-agency" or "intra-agency" communications subject to protect under Exemption  
9 5. *See Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 172 (D.D.C. 2011)  
10 (*Vaughn* submissions did not provide a sufficient basis for evaluating whether agency improperly  
11 withheld documents under Exemption 5 because the plaintiff had provided evidence casting doubt  
12 as to whether the Government shared with non-Executive Branch entities the responsive  
13 documents it withheld from the plaintiff); *cf. EFF I*, 639 F.3d at 891 ("Nearly all of the  
14 characterizations in the government-offered declarations comport with the descriptions in the  
15 *Vaughn* indices of inter-branch or intra-branch communications."). Accordingly, the Court only  
16 addresses whether Exemption 5 applies to Documents 1, 4, and 27, which the Government has  
17 adequately supported as intra- or inter-agency documents; Documents 6, 7, 25, and 32 shall be  
18 released.

19       1. Attorney-Client Privilege

20       The parties dispute whether the DEA has provided sufficient information to prove  
21 Documents 1, 4, and 27 are protected under the attorney-client privilege. EFF Mot. at 10-11;  
22 Gov't Reply at 5-6. To invoke the privilege, the party seeking protection must establish the  
23 following elements:

24       (1) when legal advice of any kind is sought (2) from a professional  
25 legal adviser in his or her capacity as such, (3) the communications  
26 relating to that purpose, (4) made in confidence (5) by the client, (6)  
27 are, at the client's instance, permanently protected (7) from  
disclosure by the client or by the legal adviser (8) unless the  
protection be waived.

28       *United States v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002), as amended on denial of reh'g

1 (Mar. 13, 2002) (citations omitted)). “A communication from the attorney to the client that does  
2 not contain legal advice may be protected if it ‘directly or indirectly reveals communications of a  
3 confidential nature by the client to the attorney.’” *United States v. Christensen*, 801 F.3d 970,  
4 1007 (9th Cir. 2015) (internal quotation marks and edits omitted); *see id.* (“[A] communication  
5 from the attorney to a third party acting as his agent for the purpose of advising and defending his  
6 clients also may be protected if it reveals confidential client communications.” (internal quotation  
7 marks omitted)). “[A]n agency can be a ‘client’ and agency lawyers can function as ‘attorneys’  
8 within the relationship contemplated by the privilege.” *Coastal States Gas Corp. v. Dep’t of*  
9 *Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).

10 The Government represents that information in Document 1 was confidentially  
11 communicated between “federal government attorneys, including a Deputy Assistant Attorney  
12 General at DOJ, to and among federal government employees[,]” Document 4 is a draft  
13 memorandum communicated by an attorney in the DEA Office of Chief Counsel, and Document  
14 27 was confidentially communicated via “internal-DEA e-mails” from “DEA attorneys to DEA.”  
15 Myrick Decl. ¶¶ 37-38, 42. But the Government fails to show that these documents contain legal  
16 advice or could reveal communications of a confidential nature. The Government’s declaration is  
17 too conclusory. *See Wiener v. FBI*, 943 F.2d 972, 978-79 (9th Cir. 1991) *cert. denied*, 505 U.S.  
18 1212 (1992) (holding that unless the agency discloses as much information as possible without  
19 thwarting the claimed Exemption’s purpose, the adversarial process is unnecessarily  
20 compromised, and affidavits consisting of “boilerplate” descriptions that fail “to tailor the  
21 explanation to the specific document withheld” are insufficient); *Coastal States*, 617 F.2d at 861  
22 (“We repeat, once again, that conclusory assertions of privilege will not suffice to carry the  
23 Government’s burden of proof in defending FOIA cases.”). Specifically, the *Vaughn* Index  
24 vaguely describes the e-mails in Document 1 as “addressing legal issues relating to Hemisphere”  
25 which “deliver[] confidential legal advice (albeit preliminary advice) regarding features of the  
26 Hemisphere program and does not itself establish final policy.” *Vaughn* Index at 1-2, No. 1. The  
27 Government’s supporting declaration adds little to the *Vaughn* Index, merely regurgitating the  
28 same description included in the *Vaughn* Index. *See* Myrick Decl. ¶ 37. Ultimately, the

1 Government's declaration is too vague: it does not indicate even generally what sorts of legal  
2 issues are presented in these e-mails, nor does not explain what "features" of the Hemisphere  
3 program are at issue. That the communications were between an attorney and agency employees  
4 does not establish the documents are protected under the attorney client privilege; without more  
5 about what "features" or "legal issues" are discussed or why they might be confidential in nature,  
6 the Government has not raised enough facts to show that Document 1 may be protected by the  
7 privilege.

8 As to Document 27, the *Vaughn* Index merely describes it as an e-mail "concerning  
9 Hemisphere and subpoenas," without explaining the context in which subpoenas are discussed.  
10 *Vaughn* Index at 84, No. 27. For instance, the Government fails to explain whether it is referring  
11 to particular subpoenas or whether the communications are simply administrative procedures or  
12 instructions related to subpoenas in general. Though the Government states that Document 27  
13 contains e-mails "concerning Hemisphere and subpoenas to and/or from DEA attorneys," it  
14 merely asserts that the e-mails are privileged "because of the confidential legal advice from DEA  
15 attorneys to DEA contained therein." Myrick Decl. ¶ 42. The Government is essentially asking  
16 the Court to presume that because it uses the word "subpoenas" and states that attorneys wrote or  
17 received e-mails, these documents therefore reveal attorney-client communications of a  
18 confidential nature. Merely reiterating the elements of the privilege, however, does not satisfy the  
19 Government's burden of establishing the privilege applies to this document. *See Ctr. for*  
20 *Biological Diversity v. Office of Mgmt. & Budget*, 625 F. Supp. 2d 885, 892 (N.D. Cal. 2009)  
21 (holding that defendants could not invoke the privilege by merely restating the scope of the  
22 privilege and stating that the documents fell within that scope).

23 Next, the Government indicates Document 4 is a draft memorandum communicated by an  
24 attorney in the DEA Office of Chief Counsel to the DEA, and contains legal advice by "analyzing  
25 legal issues regarding the procedures used to obtain information through Hemisphere, intended to  
26 assist senior DEA management, and containing comments added by the same attorney regarding  
27 the same topics." Myrick Decl. ¶ 38, *Vaughn* Index at 10-11, No. 4. But the Government does not  
28 articulate why this information is confidential or contains legal advice. While it asserts that this

1 document contains “confidential legal advice,” again, this merely states the element without  
2 explaining the basis of that confidentiality. *Id.* The Government has not sufficiently demonstrated  
3 the confidential nature of Document 4. *See In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)  
4 (“[T]he claimant must demonstrate with reasonable certainty . . . that the lawyer’s communication  
5 rested in significant and inseparable part on the client’s confidential disclosure.” (internal citation  
6 omitted)); *Elec. Frontier Found. v. CIA* (“EFF II”), 2013 WL 5443048, at \*16 (N.D. Cal. Sept.  
7 30, 2013) (“[T]he agency must show that it supplied information to its lawyers with the  
8 expectation of secrecy and the information was not known by or disclosed to any third party.”);  
9 *see also Am. Civil Liberties Union of N. Cal. v. Dep’t of Justice*, 2015 WL 4241005, at \*4 (N.D.  
10 Cal. July 13, 2015) (“While the Government states that this email contains the ‘Criminal  
11 Division’s legal advice on how law enforcement may use its own equipment to obtain location  
12 information for a particular wireless device,’ . . . it is not clear how this document qualifies as  
13 legal advice . . . . Without more, the Court cannot find this document is protected under the  
14 attorney-client privilege of Exemption 5.” (brackets and internal citation omitted)). Accordingly,  
15 the Court cannot find Document 4 is protected under the attorney-client privilege.

16 Finally, while the Government argues its generalized descriptions are sufficiently specific  
17 to show the documents contain “confidential legal advice,” it relies only on cases that demonstrate  
18 how its support in this case is lacking. *See* Gov’t Reply at 5 (citing *Performance Coal Co. v. U.S.*  
19 *Dep’t of Labor*, 847 F. Supp. 2d 6, 15 (D.D.C. 2012) (upholding privilege where lawyer gave her  
20 opinion based on confidential communications regarding specific allegations against the agency  
21 and also involving settlement recommendations); *Judicial Watch, Inc. v. U.S. Dep’t of the*  
22 *Treasury*, 802 F. Supp. 2d 185, 200, 204 (D.D.C. 2011) (upholding privilege where memoranda  
23 contained lawyer’s legal analyses of proposed compensation structures and statutory  
24 requirements); *Ctr. For Medicare Advocacy, Inc. v. U.S. Dep’t of Health & Human Servs.*, 577 F.  
25 Supp. 2d 221, 238 (D.D.C. 2008) (upholding privilege where the defendant “identified the source  
26 and recipient of the communications, which is critical to the Court’s assessment of whether the  
27 communications are between an attorney and a client” and where communications were made for  
28 the purpose of seeking legal advice or rendering legal advice about the transfer of an agency

1 appeals process, as well as draft regulations, draft hearings manuals, draft memoranda of  
2 understanding, drafting talking points, and draft reports to Congress); *Odland v. Fed. Energy*  
3 *Regulatory Comm'n*, 34 F. Supp. 3d 3, 19 (D.D.C. 2014) (upholding privilege where the  
4 Government disclosed the source and recipient of the communications and stated that the  
5 communications contained legal advice regarding underlying legal proceedings); *Touarsi v. U.S.*  
6 *Dep't of Justice*, 78 F. Supp. 3d 332, 345 (D.D.C. 2015) (upholding privilege where declaration  
7 "makes clear" the confidential attorney-client communications involved a specific investigation  
8 and potential prosecution); *Judicial Watch, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 20 F. Supp.  
9 3d 247, 258 (D.D.C. 2014) (upholding privilege involving, among other things, an e-mail chain  
10 with a lawyer weighing approaches to take in possible forthcoming litigation)). The Government  
11 argues the agency's task should not be "herculean" in providing supporting evidence for its  
12 claimed Exemptions. Gov't Reply at 5 (quotation marks omitted). But while the Government  
13 need not expose the very information contained in the withheld documents, here it does not  
14 provide the sufficient information for this Court to assess its assertion of privilege. The Court is  
15 not asking the Government to make a herculean effort, merely something beyond regurgitation of  
16 the elements. Without more, the Court cannot find Documents 1, 4, and 27 protected by the  
17 attorney-client privilege.

18 2. Attorney Work-Product

19 The parties also dispute whether Documents 1, 4, and 27 are protected as attorney work-  
20 product. EFF Mot. at 10; Gov't Reply at 6-8. Under the attorney work-product doctrine,  
21 documents are protected from discovery if they are "prepared in anticipation of litigation or for  
22 trial" and prepared "by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A); *In*  
23 *re Grand Jury Subpoena Mark Torf/Torf Envtl. Mgmt.*, 357 F.3d 900, 907 (9th Cir. 2004).

24 EFF argues the Government needs to "identify the litigation for which the documents were  
25 created" while the Government argues the privilege includes documents prepared in anticipation  
26 of foreseeable litigation, even if no specific claim is contemplated. EFF Mot. at 10 (quoting  
27 *Church of Scientology Int'l v. U.S. Dep't of Justice*, 30 F.3d 224, 237 (1st Cir. 1994); Gov't Reply  
28 at 6 (quoting *Am. Civil Liberties Union of N. Cal. v. Dep't of Justice*, 70 F. Supp. 3d 1018, 1030

1 (N.D. Cal. 2014)); citing *Feshbach v. Sec. & Exch. Comm'n*, 5 F. Supp. 2d 774, 782 (N.D. Cal.  
2 1997)). As the Court has noted in prior orders, “the primary concern in determining whether a  
3 document is protected as work product . . . [is] whether it was created in anticipation of litigation  
4 in the way the work-product doctrine demands, i.e., by risking revealing mental impressions,  
5 conclusions, opinions, or legal theories of an agency attorney, relevant to any specific, ongoing, or  
6 prospective case or cases.” *Am. Civil Liberties Union of N. Cal.*, 2015 WL 4241005, at \*2 (citing  
7 *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121, 143 (D.D.C. 2013)  
8 (“While the memorandum may be, in a literal sense, ‘in anticipation of litigation’—it simply does  
9 not anticipate litigation in the way the work-product doctrine demands, as there is no indication  
10 that the document includes the mental impressions, conclusions, opinions, or legal theories of ...  
11 any [ ] agency attorney, relevant to any specific, ongoing or prospective case or cases.”)). Here, it  
12 is not clear whether Documents 1, 4, and 27 were prepared in anticipation of *any* litigation—  
13 foreseeable or not.

14 Superficially, the Government appears to indicate these documents relate to anticipated  
15 litigation. For instance, it states Document 1 was “prepared by DOJ attorneys in anticipation of  
16 litigation relating to features of the Hemisphere program and the use of Hemisphere in law  
17 enforcement.” Myrick Decl. ¶ 37. Similarly, the Government states Documents 4 and 27 were  
18 “prepared by a DEA attorney in anticipation of litigation relating to the use of Hemisphere in law  
19 enforcement.” *Id.* ¶ 38. But the Government makes no further reference to any current or  
20 foreseeable litigation in either its supporting declarations or *Vaughn* Index or provide other  
21 context that would allow the Court make a de novo review of the Government’s work product  
22 assertions. Again, the Government cannot satisfy its burden of proof by relying on a mere  
23 recitation of the elements. *Cf. Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127  
24 (D.C. Cir. 1987) (upholding privilege where the withheld document “advise[d] the agency of the  
25 types of legal challenges likely to be mounted against a proposed program, potential defenses  
26 available to the agency, and the likely outcome”); *Church of Scientology Int'l v. IRS*, 845 F. Supp.  
27 714, 724 (C.D. Cal. 1993) (upholding privilege where the Government’s declaration and *Vaughn*  
28 Index specifically indicated the documents were “generated in preparation for litigation between

1 Plaintiff and the IRS in four specified matters"). Nor does the Government meet its burden merely  
2 by referring to law enforcement efforts. *See Senate of Puerto Rico on Behalf of Judiciary Comm.*  
3 *v. U.S. Dep't of Justice*, 823 F.2d 574, 586 (D.C. Cir. 1987) ("[I]nternal memoranda concerning  
4 the status of a criminal investigation, prepared by DOJ attorneys in the course of their law  
5 enforcement duties, are surely the kind of documents commonly sheltered by the work product  
6 doctrine" but calling the government's affidavit a "bare" assertion where it merely stated that the  
7 documents "were prepared by Civil Rights Division attorneys in anticipation of litigation" and  
8 provided no other information). As such, the Court cannot find Documents 1, 4, and 27  
9 necessarily protected as work-product.

10 The Court acknowledges the *EPIC* court reached a different conclusion as to Document 1.  
11 It appears that the *EPIC* plaintiff essentially waived argument on this issue by failing to contest  
12 the application of the work-product doctrine to the email message in its first summary judgment  
13 brief. *EPIC*, 2016 WL 3557007, at \*8. Although the *EPIC* court considered essentially the same  
14 supporting declarations as offered here, it found adequate grounds to find the document  
15 constituted work product. *Id.* at \*9 (finding "no reason to doubt the veracity of Ms. Myrick's  
16 declaration" and noting "the nature of the Hemisphere program, which clearly implicates  
17 controversial law-enforcement techniques and privacy rights as evidenced by this lawsuit, satisfies  
18 the Court that it is objectively reasonable for the government agencies involved to hold a  
19 subjective belief that litigation was and is a real possibility."). Having carefully weighed the  
20 analysis in *EPIC* and the Government's showing here, the Court ultimately cannot find the  
21 Government adequately supports the application of this privilege. The Government merely recites  
22 the elements necessary to establish the privilege, but it does not explain *why* they are met, such as  
23 explaining why these particular documents relate to some anticipated litigation. *See Senate of*  
24 *Puerto Rico*, 823 F.2d at 586-87 ("While it may be true that the prospect of future litigation  
25 touches virtually any object of a DOJ attorney's attention, if the agency were allowed to withhold  
26 any document prepared by any person in the Government with a law degree simply because  
27 litigation might someday occur, the policies of the FOIA would be largely defeated." (internal  
28 quotation marks omitted)). Accordingly, given the disparity between this Court's and the *EPIC*

1 court's findings, the Court orders the Government to produce Document 1 for *in camera* review.

2       3.       Deliberative Process Privilege

3       The Government also asserts Documents 1, 4, and 32 are protected by the deliberative  
4       process privilege. *See* Gov't Mot. at 9-11. The purpose of the privilege is "to allow agencies  
5       freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of  
6       public scrutiny." *Assembly of State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th  
7       Cir. 1992), *as amended on denial of reh'g* (Sept. 17, 1992). Documents must be both  
8       predecisional and deliberative to be protected under this privilege. *Id.* A document is  
9       "predecisional" if it was "prepared in order to assist an agency decisionmaker in arriving at his  
10       decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).  
11       Predecisional documents may include "recommendations, draft documents, proposals,  
12       suggestions, and other subjective documents which reflect the personal opinions of the writer  
13       rather than the policy of the agency." *Assembly of State of Cal.*, 968 F.2d at 920 (quoting *Coastal  
14       States*, 617 F.2d at 866). A predecisional document is deliberative if "the disclosure of the  
15       materials would expose an agency's decisionmaking process in such a way as to discourage candid  
16       discussion within the agency and thereby undermine the agency's ability to perform its functions."  
17       *Id.* (quoting *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir.  
18       1987)). Although facts are not protected by the deliberative process privilege, factual material  
19       may be "so interwoven with the deliberative material that it is not severable." *United States v.  
20       Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000).

21       The Court ultimately finds the Government has not shown Documents 1, 4, and 32 are  
22       protected under the deliberative process privilege. Assuming the documents are predecisional, the  
23       Government has failed to show how the disclosure of these documents would discourage candid  
24       discussion within the DEA and undermine its ability to function. *See Kowack v. U.S. Forest Serv.*,  
25       766 F.3d 1130, 1135 (9th Cir. 2014) (rejecting assertion of deliberative process where the  
26       Government did not "adequately show how the disclosure of any portion of the redacted  
27       documents would expose the agency's decision-making process itself to public scrutiny.") (quoting  
28       *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988); edits and internal

1 quotation marks omitted)). For Documents 1 and 4, the Government offers no information other  
2 than the general assertion the documents were “intended to facilitate or assist” development of the  
3 DEA’s final policy decisions regarding Hemispheres’ “features” or “use” and its use in law  
4 enforcement. Myrick Decl. ¶¶ 37-38. Document 32’s *Vaughn* Index description appears to  
5 appreciate the “deliberative” element, describing the purpose for this exemption, but it ultimately  
6 does not explain how the draft policy actually risks undermining that purpose. *See Vaughn* Index  
7 at 100, No. 32. In other words, the Government does not explain how the disclosure of these  
8 documents would affect its deliberative process by preventing or discouraging DEA employees or  
9 affiliates from giving their honest opinions, recommendations, or suggestions on how to develop  
10 policy decisions. *Cf. Maricopa*, 108 F.3d at 1094-95 (finding documents deliberative as they  
11 consisted of “recommendations” and “suggestions” from an agency official to an independent  
12 consultant regarding charges against him, and adding that the official sought the consultant  
13 specifically for his “frankness” and “independence” in hopes of receiving an objective opinion).  
14 Moreover, factual information that does not reveal the deliberative process is not subject to  
15 protection. *See Kowack*, 766 F.3d at 1135. As such, the Government has not shown these  
16 documents are covered by the deliberative process privilege.

17 Again, the Court has arrived at a different conclusion than the *EPIC* court as to Document  
18 4. *See EPIC*, 2016 WL 3557007, at \*7. As to this document, the *EPIC* court was seemingly  
19 satisfied that because “the memorandum includes comments by the attorney who prepared the  
20 document” it “reflect[s] the deliberative posture of the memorandum.” *Id.* But this analysis does  
21 not assess whether the Government adequately supports that disclosure of this document could  
22 discourage candid discussion within the DEA and undermine its ability to perform its functions.  
23 This Court must do so under Ninth Circuit law as discussed above. The Court nonetheless will  
24 review Document 4 *in camera* given the disparity between these holdings.

25 4. Summary of Exemption 5 Withholdings

26 The Government has not provided support for its decision to withhold Documents 1, 4, 6,  
27 7, 25, 27, and 32 under Exemption 5. However, the Government also withheld these documents  
28 under Exemption 7, which the Court discusses next.

1      **B. Exemption 7**

2      Exemption 7 permits the Government to withhold “records or information compiled for  
 3      law enforcement purposes” under certain enumerated requirements. 5 U.S.C. § 552(b)(7). “The  
 4      term ‘law enforcement purpose’ has been construed to require an examination of the agency itself  
 5      to determine whether the agency may exercise a law enforcement function.” *Church of*  
 6      *Scientology I*, 611 F.2d at 748. If an agency has a clear law enforcement mandate, it “need only  
 7      establish a ‘rational nexus’ between enforcement of a federal law and the document for which an  
 8      exemption is claimed.” *Id.*

9      It is undisputed that the documents at issue in this case were “compiled for law  
 10     enforcement purposes” (EFF Mot. at 14); the dispute is whether the documents withheld by the  
 11     Government satisfy the requirements of Exemptions 7(A), 7(C), and 7(D). EFF’s chart  
 12     summarizes the Exemptions asserted for each withheld document:

#	Page #	Document Description <sup>[7]</sup>	A	D	E
1	1-12	Emails with attachments among federal staff including a Deputy Assistant Attorney General addressing Hemisphere legal issues	x	x	x
2	13-14	Emails within DEA from August 2008 through September 2012 about Hemisphere, subpoenas, and use of Hemisphere	x	x	x
4	16-27	Draft memorandum by the DEA’s Office of Chief Counsel about Hemisphere legal issues	x	x	x
5	28-30	Slides about Hemisphere users, providers, and subpoenas	x	x	x
6	31-34	Record about how to use Hemisphere capabilities	x	x	x
7	35-36	Record about how to use Hemisphere	x	x	x
8	37-39	Document used in connection with Hemisphere	x	x	x
9	40-41	Hemisphere request form	x		x
10	42-46	Emails with attachments within DEA in October 2008 about Hemisphere use and subpoena	x	x	x
11	47-48	Hemisphere request form	x		x

26  
 27      <sup>7</sup> These descriptions correspond with the Government’s descriptions in its draft *Vaughn* Index.  
 28      See generally *Vaughn* Index.

United States District Court  
Northern District of California

1	12	49-50	Slides about Hemisphere subpoenas	x	x	x
2	14	53-55	A form court order for California Superior Court	x	x	x
3	16	59-72	Emails with attached agenda and charts within DEA in May 2012 about a Hemisphere meeting in June 2012		x	x
4	17	73-77	Emails of May 2012 with attachments about Hemisphere requests	x	x	x
5	18	78-79	Email in September 2013 about Hemisphere articles and scrutiny		x	x
6	19	80-95	Email of December 2013 from L.A. HIDTA with attached data slides	x	x	x
7	22	100-05	Emails and attachments in October 2010 and September 2012 titled “request form and contract”	x	x	x
8	23	106	DEA subpoena form	x	x	x
9	25	110	Email in May 2007 about legal issues about Hemisphere and subpoenas		x	x
10	26	111-252	Hemisphere tutorial	x	x	x
11	27	[2]53- 54 <sup>8</sup>	Emails within DEA including attorneys in November 2007 about Hemisphere Subpoenas	x	x	x
12	28	255-59	Email with attachments within DEA in January 2008 about Hemisphere subpoena protocols	x	x	x
13	29	260-64	Unsolicited Hemisphere proposal in August 2007	x	x	x
14	30	265	Email within DEA in November 2007 about Hemisphere changes		x	x
15	31	266	Email within DEA in January 2008 about Hemisphere subpoenas		x	x
16	32	267-68	Emails in June 2008 about a draft Hemisphere		x	x
17	34	278-82	Hemisphere Summary	x	x	x

EFF Mot. at 12; *see also id.* at 5 (noting EFF “advised defendant it would no longer challenge defendant’s withholding of any parts of . . . [Documents] 3, 13, 15, 20, 21, 24, 33, and 35 in the final *Vaughn* Index”); Myrick Decl. ¶¶ 49, 59 (noting (1) “DEA applied FOIA Exemption 7(A) to

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<sup>8</sup> EFF’s chart referred to Document 27 as identifying page numbers “353-54” but this appears to be a typographical error as the *Vaughn* Index refers to Document 27 as identifying page numbers “253-254.” *Vaughn* Index at 83, No. 27.

1 the following documents: 1-2, 4-14, 17, 19, 22-24, 26-29, and 33-35”; (2) “DEA applied FOIA  
2 Exemption 7(D) to the following documents: 1-2, 4-8, 10, 12, 14, 16-19, and 21-25”; and (3)  
3 “DEA applied FOIA Exemption 7(E) to the following documents: 1-14, 16-20, and 21-35.”). The  
4 Government does not dispute the accuracy of this chart, though it notes that it did not withhold all  
5 of these documents in full. Gov’t Reply at 11.

6 1. Exemption 7(A)

7 Exemption 7(A) protects records compiled for a law enforcement purpose to the extent that  
8 disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. §  
9 552(b)(7)(A). The agency bears the burden establishing “that it is a law enforcement agency, that  
10 the withheld documents were investigatory records compiled for law enforcement purposes, and  
11 that disclosure of those documents would interfere with pending enforcement proceedings.”  
12 *Lewis*, 823 F.2d at 379 (citations omitted).

13 At issue is whether the Government has established the disclosure of the documents above  
14 would interfere with pending enforcement proceedings.<sup>9</sup> EFF Mot. at 13-14; EFF Reply at 6-7;  
15 Gov’t Reply at 11-12. EFF agrees Hemisphere is a law enforcement tool used by multiple law  
16 enforcement agencies to support existing investigations, but it argues this fact “does not tend to  
17 show, as required by Exemption 7(A), that disclosure ‘could reasonably be expected to interfere  
18 with enforcement proceedings.’” EFF Mot. at 14 (quoting Gov’t Mot. at 13).

19 The Government asserts it withheld these documents based on the advice of DEA  
20 personnel familiar with the use of Hemisphere in law enforcement, current enforcement efforts,  
21 and existing law enforcement strategies. Myrick Decl. ¶ 48. Rather than providing specific detail  
22 about any specific pending or prospective law enforcement proceedings, the Government  
23 generally argues “[t]he release of information about the scope of Hemisphere could reasonably be  
24 expected to assist targets who could then use this information to evade law enforcement.” Gov’t  
25

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26 <sup>9</sup> The *EPIC* court did not consider whether any of these documents were protected under  
27 Exemption 7(A). In supplemental briefing, EFF argues that “the federal government’s decision  
28 not to assert Exemption 7(A) over 107 pages in the *EPIC* case shows that Exemption 7(A) does  
not apply to those same 107 pages in this case.” EFF Sixth Suppl. Resp., Dkt. No. 47 (citing EFF  
Fifth Suppl. Resp.).

1 Mot. at 14-15. In its Reply, it broadly asserts that “[r]evealing the particular scope, parameters,  
2 uses, and functionality of a law enforcement technique would render that law enforcement  
3 technique worthless which, in turn, could reasonably be expected to interfere with all of the  
4 enforcement proceedings currently using Hemisphere.” Gov’t Reply at 12.

5 The Ninth Circuit has consistently held that the Government “need only explain, publicly  
6 and in detail, how releasing each of the withheld documents would interfere with the  
7 government’s ongoing criminal investigation.” *Lion Raisins*, 354 F.3d at 1084 (citing *Lewis*, 823  
8 F.2d at 379). The Government’s “submission must provide as much factual support for [its]  
9 position as possible without jeopardizing [its] legitimate law enforcement interest in withholding  
10 the documents, and it must be ‘detailed enough for the district court to make a *de novo* assessment  
11 of the government’s claim of exemption.’” *Id.* (quoting *Maricopa*, 108 F.3d at 1092).

12 But the *Vaughn* Index<sup>10</sup> and the Government’s declarations fall short of providing  
13 “detailed enough” information about these documents to show how their disclosure “could  
14 reasonably be expected to interfere with law enforcement proceedings.” *Shannahan*, 672 F.3d at  
15 1145 (quoting *Kamman*, 56 F.3d at 48). As EFF notes, the Government’s broad argument that  
16 anytime a law enforcement technique is revealed risks interference with law enforcement  
17 proceedings seems to implicate Exemption 7(E), concerning the disclosure of “techniques or  
18 procedures for law enforcement investigations or prosecutions,” rather than Exemption 7(A)  
19 concerning interference in law enforcement proceedings. EFF Reply at 7. While the Court  
20 considers Exemption 7(E) below, the Government’s broad assertions about this generalized risk do  
21 not indicate a more particularized risk of interference with pending or prospective law  
22 enforcement proceedings. None of the Government’s evidence suggests that exposing these  
23 documents would interfere with law enforcement proceedings. *Cf. Lewis*, 823 F.2d at 379 & n.5  
24 (finding Exemption 7(A) properly applied where it was undisputed the release of the requested  
25 documents would reveal, among other things, the limits and scope of the IRS’s case against the  
26

27  
28 <sup>10</sup> The *Vaughn* Index repeatedly asserts the conclusory statement under Exemption 7(A) that each  
withheld document contained “[m]aterial the disclosure of which could reasonably be expected to  
interfere with enforcement proceedings”—without any further support as to *why*.

1 requesting party, the names of third parties whom the IRS had contacted as well as the names of  
2 actual and potential witnesses).

3 Furthermore, the Government acknowledges EFF no longer seeks information related to  
4 the names, telephone numbers, and email addresses of individual core mission law enforcement,  
5 law enforcement support, and individual personnel involved in the operation of Hemisphere. *See*  
6 Scharf Decl. ¶ 4, Ex. B; *see also* EFF Mot. at 1 n.1. As EFF concedes the Government may  
7 properly redact this information, the Government has no basis to allege that the exposure of these  
8 documents would reveal information about law enforcement agents, etc., which would risk  
9 interference with law enforcement proceedings. Without more, the Court cannot find these  
10 documents are properly withheld under Exemption 7(A).

11 2. Exemption 7(D)

12 Exemption 7(D) provides that “records or information compiled for law enforcement  
13 purposes” may be withheld if they “could reasonably be expected to disclose the identity of a  
14 confidential source . . . [who] furnished information on a confidential basis, and, in the case of a  
15 record or information compiled by a criminal law enforcement authority in the course of a  
16 criminal investigation . . . , information furnished by a confidential source.” 5 U.S.C. §  
17 552(b)(7)(D). “Under this exemption, a source is ‘confidential’ if it ‘provided information under  
18 an express assurance of confidentiality or in circumstances from which such an assurance could be  
19 reasonably inferred.’” *Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 814 (9th Cir. 1995)  
20 (quoting *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993)). Indeed, the Ninth Circuit  
21 has “observed that such an express promise of confidentiality is ‘virtually unassailable.’” *Id.*  
22 (quoting *Wiener*, 943 F.2d at 986). It is also easy to prove: the Government “need only establish  
23 the informant was told his name would be held in confidence.” *Id.* “The focus, therefore, is not  
24 whether ‘the requested document is of the type that the agency usually treats as confidential, but  
25 whether the particular source spoke with an understanding that the communication would remain  
26 confidential.’” *Id.* (quoting *Landano*, 508 U.S. at 172) (emphasis in original). To meet its burden,  
27 the Government must “make an individualized showing of confidentiality with respect to each  
28 source”; confidentiality cannot be presumed. *Landano*, 508 U.S. at 174, 178.

1       The question is whether the sources are actually confidential. The Government argues “the  
2 information Defendant withheld under Exemption 7(D) identifies private-sector companies that  
3 are instrumental in the operation of Hemisphere and whose role in the operation of Hemisphere  
4 entails providing information to the Government.” Gov’t Mot. at 16 (citing Myrick Decl. ¶ 54).  
5 Further, “[t]he declaration explains, based on information from DEA personnel familiar with  
6 Hemisphere, that the companies provide information to law enforcement with the express  
7 *expectation* that both the source and the information will be afforded confidentiality and under  
8 circumstances where confidentiality *can be inferred* because providing the information can lead to  
9 retaliation against the companies.” *Id.* (citing Myrick Decl. ¶ 54) (emphasis added).

10       EFF argues the Government “has failed to show those companies shared information with  
11 the agency under either an express or implied assurance of confidentiality[,]” noting that the  
12 Government “only asserts the companies had ‘the express *expectation*’ of confidentiality” without  
13 providing a support that the government’s declarant had any “personal knowledge or any other  
14 factual basis for [the government’s] assertion about any company’s expectations.” EFF Mot. at 15  
15 (emphasis in original). Finally, EFF challenges the implied assurance of confidentiality based on  
16 the government’s argument that “providing information can lead to retaliation against the  
17 companies.” *Id.* at 16. Specifically, it notes the Supreme Court has held that an “implied  
18 understanding of confidentiality” cannot rest solely on the possibility that a private institution  
19 “might be subject to possible legal action or loss of business if their cooperation with [law  
20 enforcement] became publicly known.” *Id.* (citing *Landano*, 508 U.S. at 176).

21       Whatever “express expectation” of confidentiality these private companies may have, the  
22 Government has provided no indication it ever told these companies their names would be held in  
23 confidence. *Cf. Davin v. Dep’t of Justice*, 60 F.3d 1043, 1061 (3d Cir. 1995) (“[I]f an agency  
24 attempts to withhold information under Exemption 7(D) by *express* assurances of confidentiality,  
25 the agency is required to come forward with probative evidence that the source did in fact receive  
26 an *express* grant of confidentiality.” (emphasis in original)).

27       Nor has the Government shown that such an assurance of confidentiality could be  
28 reasonably inferred. “An implied assurance of confidentiality may be inferred from evidence

1 showing the circumstances surrounding the imparting of the information, including the nature of  
2 the criminal investigation, the informant's relationship to it, whether the source received payment,  
3 and whether the source has an 'ongoing relationship' with the law enforcement agency and  
4 typically communicates with the agency 'only at locations and under conditions which assure the  
5 contact will not be noticed.'" *EFF II*, 2013 WL 5443048, at \*21 (quoting *Landano*, 508 U.S. at  
6 179). Again, the Government makes no showing of reasonable inference of an assurance of  
7 confidentiality. As EFF explains, *Landano* dealt with a similar situation where the government  
8 "maintain[ed] that an assurance of confidentiality can be inferred whenever an individual source  
9 communicates with the FBI because of the risk of reprisal or other negative attention inherent in  
10 criminal investigations." 508 U.S. at 176. But the Supreme Court rejected that argument, noting  
11 that it is not reasonable to infer that the information is given with an implied understanding of  
12 confidentiality in all cases. *Id.* The Government provides no other basis for the Court can assess  
13 regarding an implied assurance of confidentiality.

14 Without more, the Government fails to carry its burden under Exemption 7(D). *See also*  
15 *EPIC*, 2016 WL 3557007, at \*9-11 (finding same, but giving the Government the opportunity to  
16 "either disclose the relevant information withheld under Exemption 7(D), supplement the record  
17 with additional affidavits and authority justifying its withholding, or produce documents for the  
18 Court's *in camera* review.").

19       3.       Exemption 7(E)

20       Exemption 7(E) protects from disclosure law enforcement "records or information  
21 compiled for law enforcement purposes, but only to the extent that the production of such law  
22 enforcement records or information . . . would disclose techniques and procedures for law  
23 enforcement investigations or prosecutions, or would disclose guidelines for law enforcement  
24 investigations or prosecutions if such disclosure could reasonably be expected to risk  
25 circumvention of the law." 5 U.S.C. § 552(b)(7)(E). To withhold information under this  
26 exemption, an agency must demonstrate that the withheld information was "compiled for law  
27 enforcement" purposes by establishing a "rational nexus" between "enforcement of a federal law  
28 and the document for which" the exemption is claimed. *Rosenfeld*, 57 F.3d at 808.

1       The Ninth Circuit recently revisited Exemption 7(E) in *Hamdan v. United States*  
2       *Department of Justice*, 797 F.3d 759 (9th Cir. 2015). In *Hamdan*, the Ninth Circuit adopted the  
3       Second Circuit's reasoning in *Allard K. Lowenstein International Human Rights Project v.*  
4       *Department of Homeland Security*, 626 F.3d 678 (2d Cir. 2010). 797 F.3d at 777-78. In so doing,  
5       the Ninth Circuit agreed that Exemption 7(E)'s sentence structure indicates that the qualifying  
6       phrase in 5 U.S.C. § 552(b)(7)(E)—“if such disclosure could reasonably be expected to risk  
7       circumvention of the law”—“modifies only ‘guidelines’ and not ‘techniques and procedures.’” *Id.*  
8       at 778 (quoting *Allard*, 626 F.3d at 681). Consequently, an agency need not show that disclosure  
9       of its techniques would risk circumvention of the law for Exemption 7(E) to apply; rather the risk  
10      of circumvention of the law only applies to agency “guidelines.” *See Hamdan*, 797 F.3d at 777.

11       The *Hamdan* court also revisited its prior holding that “Exemption 7(E) only exempts  
12      investigative techniques not generally known to the public[,]” *Rosenfeld*, 57 F.3d at 815, *Hamdan*  
13      interpreted *Rosenfeld*'s statement as endorsing the withholding of the “specific *means*” of  
14      conducting a technique, “rather than an *application*” of “a known technique.” *Hamdan*, 797 F.3d  
15      at 777 (emphasis in original). *Hamdan* notes that “[i]n *Rosenfeld*, we decided that a pretext phone  
16      call was a generally known law enforcement technique”; however “the government argued that the  
17      technique at issue involved the specific *application* of a pretext phone call, because it used ‘the  
18      identity of a particular individual . . . as the pretext.’” *Id.* (emphasis added) (quoting *Rosenfeld*, 57  
19      F.3d at 815). The *Hamdan* court rejected the government's argument: “accepting it would allow  
20      anything to be withheld under Exemption 7(E) because any specific *application* of a known  
21      technique would be covered.” *Id.* (citing *Rosenfeld*, 57 F.3d at 815). Consequently, the Ninth  
22      Circuit agreed the FBI properly withheld records the FBI asserted would reveal “techniques and  
23      procedures related to surveillance and credit searches,” because even though “credit searches and  
24      surveillance are publicly known law enforcement techniques . . . the affidavits say that the  
25      records reveal techniques that, if known, could enable criminals to educate themselves about law  
26      enforcement methods used to locate and apprehend persons[, which] . . . implies a specific means  
27      of conducting surveillance and credit searches rather than an *application*.” *Id.* at 777-78. The  
28      Ninth Circuit pointed out that “[b]y contrast, withholding, for example, records under Exemption

1 7(E) by claiming that they reveal the satellite surveillance of a particular place would be an  
2 application of a known technique under *Rosenfeld* ]][.]” *Id.* at 778.

3 Finally, *Hamdan* does not just interpret *Rosenfeld* but also indicates it is supported by  
4 *Bowen v. United States Food and Drug Administration*, 925 F.2d 1225, 1229 (9th Cir. 1991). *See*  
5 *Hamdan*, 797 F.3d at 778 (citing *Bowen* with the “*Cf.*” parenthetical indicating *Bowen* held “that  
6 additional details of law enforcement techniques were exempt from disclosure under 7(E) even  
7 where some information about those techniques had been previously disclosed”). In the past,  
8 courts adopted *Bowen*’s finding that even if techniques where generally known to the public, if the  
9 records withheld revealed “detailed, technical analysis” of the techniques and procedures used,  
10 then that information may still be properly withheld under Exemption 7(E). *See, e.g., EFF II*,  
11 2013 WL 5443048, at \*22; *Am. Civil Liberties Union of N. Cal*, 2015 WL 4241005, at \*7; *Am.*  
12 *Civil Liberties Union of N. Cal. v. Fed. Bureau of Investigation*, 2015 WL 678231, at \*7 (N.D.  
13 Cal. Feb. 17, 2015), *appeal dismissed* (Jan. 5, 2016); *Elec. Frontier Found. v. Dep’t of Homeland*  
14 *Sec.* (“*EFF IIP*”), 2014 WL 1320234, at \*5 (N.D. Cal. Mar. 31, 2014); *Am. Civil Liberties Union v.*  
15 *Fed. Bureau of Investigation*, 2013 WL 3346845, at \*9 (N.D. Cal. July 1, 2013); *Elec. Frontier*  
16 *Found. v. Dep’t of Def.*, 2012 WL 4364532, at \*4 (N.D. Cal. Sept. 24, 2012).

17 As neither party addressed *Hamdan* in their initial briefing, the Court ordered supplemental  
18 briefing on *Hamdan*’s potential impact on Exemption 7(E) or segregability. Dkt. No. 38.  
19 Unfortunately, rather than clarifying matters, *Hamdan* has left the parties and the Court in a  
20 somewhat uncertain position. On one hand, *Hamdan* has adopted the Second Circuit’s *Allard*  
21 analysis that the government must show risk of circumvention of the law only when it withholds  
22 guidelines. But *Hamdan* does not clarify when a record should be considered a guideline or adopt  
23 *Allard*’s assessment of what constitutes a guideline. On the other hand, *Hamdan* also purports to  
24 clarify the issue of whether the government may only withhold information about “techniques not  
25 generally known to the public” as stated in *Rosenfeld*. The parties’ briefing on this issue  
26 demonstrates confusion over *Hamdan*’s “application” versus “specific means” test, which is also  
27 reflected in recent case law. *See Raimondo v. FBI*, 2016 WL 2642038, at \*10 (N.D. Cal. May 10,  
28 2016). To further complicate matters, *EPIC* involves several of the same records in this action,

1 but the D.C. Circuit does not recognize the distinction between guidelines and techniques when it  
2 comes to applying the “risk of circumvention of the law test.” *EPIC*, 2016 WL 3557007, at \*11  
3 (“[T]he government must ‘demonstrate logically how the release of the requested information  
4 might create a risk of circumvention of the law.’” (quoting *Blackwell v. FBI*, 646 F.3d 37, 42  
5 (D.C. Cir. 2011))).

6 The foregoing issues lead the Court to several conclusions. First, although it is unclear  
7 what documents in this case qualify as guidelines versus techniques and procedures, as the *Vaughn*  
8 Index indicates, a document may realistically contain both. In any event, as discussed below, the  
9 distinction between these two types of documents does not appear to ultimately adjust the outcome  
10 in this case due to the Government’s inadequate supporting evidence. *But see* EFF Third Suppl.  
11 Resp. at 3, Dkt. No. 36; EFF Fourth Suppl. Resp. at 4-5, Dkt. No. 38 (persuasively arguing why  
12 the Government’s descriptions of the disputed documents suggest they provide “an indication or  
13 outline of policy” and therefore constitute “guidelines”). Second, the Court interprets *Hamdan* to  
14 adopt a test similar to *Bowen* in the sense that the mere fact that the public might know about a  
15 general technique or procedure does not mean that the specific means employed as part of that  
16 technique or procedure must be disclosed. That said, the Government may not withhold a  
17 document simply because the document describes a specific application of the generally known  
18 technique or procedure—the document must reveal something more. *See Hamdan*, 797 F.3d at  
19 777-78 (finding withheld records protected because disclosure would “reveal techniques that . . .  
20 could enable criminals to educate themselves about law enforcement methods used to locate and  
21 apprehend persons . . . impl[ying] a specific means of conducting surveillance and credit  
22 searches”); *see, e.g.*, *EFF III*, 2014 WL 1320234, at \*8 (finding government meets its burden  
23 where it shows the “operational information” is not generally known and noting that “while EFF  
24 succeeds at showing that some aspects of drone operations are generally known, its piecemeal  
25 evidence does not establish that further detailed information about drones is generally known.”).  
26 Where there is no conflict of law or fact, the Court will follow the *EPIC* court’s analysis to ensure  
27 uniformity where possible.

28 The Court now turns to the specific records withheld in this case. “For purposes of further

1 describing the information withheld,” the Government divides the information withheld under  
2 Exemption 7(E) into categories. Gov’t Mot. at 18. The relevant categories at issue in this Order  
3 are: (1) “Cities and States,” i.e., the information withheld from ten records regarding the cities and  
4 states in which Hemisphere is located or in which agencies have had contact with the Hemisphere  
5 program; (2) “Companies,” i.e., the information withheld from 22 records regarding the identity of  
6 companies that the Government states are “instrumental” to Hemisphere; (3) “Agencies,” i.e., the  
7 information withheld from 12 records contained the identity of law enforcement agencies that  
8 “have access” to Hemisphere; and (4) “Requests, processing, responses, and capabilities,” i.e.,  
9 details concerning (i) internal procedures and guidelines for making Hemisphere requests, (ii) how  
10 Hemisphere requests are routed and processed and how resources are organized and deployed, (iii)  
11 how Hemisphere results and output are delivered and presented to law enforcement, and (iv) how  
12 Hemisphere technically works and its specific capabilities and limitations. Gov’t Mot. 17-21; EFF  
13 Mot. 16-20. The Court addresses each of these categories below.

14                   a.        *Cities and States*

15                   In the first category, the Government has withheld from ten records information regarding  
16 the cities or states in which Hemisphere is located or in which agencies have had contact with the  
17 Hemisphere program. *See Vaughn* Index at Nos. 4, 6, 9-11, 17-18, 23, 26, 28. This information  
18 was not considered in *EPIC*. The DEA indicates it released many pages containing city and state  
19 information, but it does not deny that it continues to withhold some of this information. The  
20 Government asserts this information “could be used by criminals to disrupt law enforcement  
21 operations or obtain unauthorized access to information about such operations.” Gov’t Mot. at 18;  
22 Myrick Decl. at 16. But the Government does not explain how criminals could do this by using  
23 information about the cities and states where Hemisphere. *See* EFF Reply at 17. EFF also notes  
24 that the public already knows that Hemisphere has regional centers in Atlanta, Houston, and Los  
25 Angeles, but the Government presents no evidence suggesting criminals have used this publicly  
26 available information to disrupt law enforcement operations or obtain unauthorized access to  
27 information. *Id.*

28                   Without more, the Court has no basis to find that the release of documents containing

information with the cities and states that use Hemisphere would “disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The Government has not shown that information regarding the cities and states where Hemisphere is located was properly withheld and subject to protection under Exemption 7(E). *See EFF II*, 2013 WL 5443048, at \*23 (rejecting Exemption 7(E) applies to information identifying the “field office” conducting an investigation, where there was no specific justification for withholding this information).

*b. Companies*

The Government has withheld from 22 records the identities of companies it contends are “instrumental” to Hemisphere. *See Vaughn* Index at Nos. 1-2, 5-8, 10, 12, 16-18, 22-23, 25-32, 34. The *EPIC* court also considered this information. *See EPIC*, 2016 WL 3557007, at \*12. As in that case, the Government asserts criminals could use this information to “tailor or adapt their activities to evade apprehension,” or “to attack facilities involved in the Hemisphere program.” *See* Myrick Decl. ¶ 58(h); Gov’t Mot. at 19 (arguing “[c]riminals could use this information to evade detection or disrupt Hemisphere’s operations (citing Myrick Decl. ¶ 58)); EPIC, 2016 WL 3557007, at \*12. In response, EFF argues the public has known for two and a half years—that is, since The New York Times’ 2013 article on it—that AT&T supports Hemisphere, and the Government has not shown or even argued that criminals have ever attempted to use this information to evade or disrupt Hemisphere. EFF Mot. at 17.

The Court agrees with EFF that the Government has not provided facts showing why it is likely criminals would use the identities of the companies that are instrumental to Hemisphere to evade or attack Hemisphere-related facilities. *See also EPIC*, 2016 WL 3557007, at \*13 (discussing various public reports about Hemisphere identifying various companies, and ultimately concluding that “[t]he DEA [] failed to logically demonstrate how release of the private corporation’s names would assist drug traffickers seeking to evade law enforcement.”). The *EPIC* court thoroughly analyzed the Government’s shortcomings in asserting Exemption 7(E) over the same or similar records containing this information. *Id.* at \*12-13. Although that court did not

1 acknowledge the distinction between guidelines and techniques and procedures, its analysis  
2 nonetheless correctly indicates that, regardless of nature of the documents, the Government has  
3 neither shown risk of circumvention of the law nor risk of exposure of a specific means of the  
4 Government's use of Hemisphere by exposing the identities of the companies related to  
5 Hemisphere. *See Hamdan*, 797 F.3d at 777-78; *see also EPIC*, 2016 WL 3557007, at \*13  
6 (“Publicly available information about such telecommunication companies’ facility locations is as  
7 available now as it would be were the DEA to disclose the identities of the companies assisting  
8 with Hemisphere.”). Without more, the Government has not demonstrated this information was  
9 properly withheld.

*c. Agencies*

11 The Government has withheld from 12 records information about the identities of the law  
12 enforcement agencies that use Hemisphere. *See Vaughn* Index at Nos. 1, 4, 6, 16, 18-19, 22-23,  
13 26, 28, 31, 34. As the Government argued in *EPIC*, it believes that “[b]ecause every law  
14 enforcement agency has its own respective focus and sphere of authority, knowing which  
15 particular law enforcement agencies have access to Hemisphere would help criminals tailor their  
16 activities to avoid apprehension” because “those criminals and criminal organizations would be  
17 better informed about the capabilities of their pursuers.” *EPIC*, 2016 WL 3557007, at \*14; *see*  
18 *also* Gov’t Mot. at 21.

19        The *EPIC* court considered and ultimately rejected these same arguments. It found the  
20      Government’s arguments “conclusory” and distinguished the cases the Government relies on for  
21      the proposition that agency identities could be withheld under Exemption 7(E). *See EPIC*, 2016  
22      WL 3557007, at \*14-15 (citations omitted). The Government’s arguments and support in this  
23      matter are no more extensive than the Government provides in *EPIC*, and this Court agrees with  
24      the *EPIC* court’s conclusion. There is no indication that the release of the identities of the  
25      agencies that use Hemisphere risks circumvention of the law or exposes techniques or procedures  
26      not already known to the public. *See Hamdan*, 797 F.3d at 778 (“[W]ithholding, for example,  
27      records under Exemption 7(E) by claiming that they reveal the satellite surveillance of a particular  
28      place would be an *application* of a known technique under *Rosenfeld*.”) (emphasis in original)).

1 In contrast to *Hamdan*, the Government does not provide support for the notion that further detail  
2 about which agencies use Hemisphere “would compromise the very techniques the government is  
3 trying to keep secret.” *Id.* Accordingly, as in *EPIC*, the Government has not demonstrated this  
4 information was properly withheld.

5 *d. “Requests, processing, responses, and capabilities”*

6 The final category of information withheld pursuant to Exemption 7(E) relates to details  
7 concerning (i) internal procedures and guidelines for making Hemisphere requests (*Vaughn* Index  
8 at Nos. 1-2, 4-12, 14, 17, 19, 22-23, 25-32, 34), (ii) how Hemisphere requests are routed and  
9 processed and how resources are organized and deployed (*id.* at Nos. 1-2, 4-7, 10, 16, 19, 22, 26,  
10 28-29, 31-32), (iii) how Hemisphere results and output are delivered and presented to law  
11 enforcement (*id.* at Nos. 4, 22, 26, 29, 34), and (iv) technical details about how Hemisphere works  
12 and its specific capabilities and limitations (*id.* at Nos. 1, 4-8, 10, 16, 22, 26-29, 34). *See* EFF  
13 Mot. at 19 (outlining same).

14 Regardless of whether the documents are guidelines or techniques and procedures, the  
15 Court finds the Government has not demonstrated that it properly withheld these documents.  
16 Specifically, the Government’s *Vaughn* Index and supporting declarations do not clearly elucidate  
17 the nature of the withheld documents or show how they could reveal information that either risks  
18 circumvention of the law or exposure to something more than a generally known technique or  
19 procedure.

20 EFF persuasively cites numerous articles and other resources describing the publicly  
21 known facts about Hemisphere, including Hemisphere’s “use[ of a] complicated phone call pattern  
22 analysis to map social networks, identify multiple phone numbers used by a single person, and  
23 determine a caller’s location”; AT&T’s relationship with Hemisphere; the roles of various  
24 government units including the DEA, the Office of National Drug Control Policy, and the High  
25 Intensity Drug Trafficking Area program; the kinds of phone records logged into the Hemisphere  
26 database; the use of administrative subpoenas to obtain Hemisphere information without a  
27 warrant; and the use of this program to find criminals who discard cellphones frequently to thwart  
28 government tracking. *See* EFF Mot. at 1-4 and related footnotes. As the *EPIC* court notes, “[t]he

1 cooperation of major telecommunication companies with Hemisphere has been widely reported by  
2 various news outlets,” and “according to one of the media reports cited in EPIC’s Complaint, the  
3 AT&T database ‘includes every phone call which passes through the carrier’s infrastructure, not  
4 just those made by AT&T customers.’” EPIC, 2016 WL 3557007, at \*12-13 (quoting *U.S. Drug*  
5 *Agency Partners with AT&T for Access to ‘Vast Database’ of Call Records*, The Guardian, Sept.  
6 2, 2013; also citing Shane & Moynihan, *supra* pp.1-2.). The New York Times article includes a  
7 link to a slide show presentation about the Hemisphere project with specific descriptions of  
8 instances where Hemisphere had identified specific individuals’ phone numbers and suspects’  
9 location. *See Synopsis of the Hemisphere Project*, N.Y. Times (Sept. 1, 2013,  
10 [http://www.nytimes.com/interactive/2013/09/02/us/hemisphere-project.html?\\_r=0](http://www.nytimes.com/interactive/2013/09/02/us/hemisphere-project.html?_r=0))).

11 While EFF demonstrates the public knows and has access to a significant body of  
12 information about Hemisphere and how it works, that does not necessarily indicate that all of the  
13 information the Government withheld is generally known or that the documents sought here could  
14 not reveal more specific information beyond what is generally known. Unfortunately, the  
15 Government provides little more than conclusory statements that the information contained in  
16 these documents

17 would help criminals understand when and how law enforcement  
18 authorities are able to use Hemisphere against them and thereby help  
19 criminals tailor or adapt their activities to avoid apprehension.  
20 Similarly, knowledge of internal guidelines and restrictions for the  
use of Hemisphere would help criminals tailor or adapt their  
activities to evade apprehension.

21 *See, e.g.*, *Vaughn* Index at 27, No. 8. Several of the documents appear provide general  
22 information about what Hemisphere is and how to use Hemisphere, including providing forms and  
23 model language. *See, e.g.*, *id.* at 54, No.19 (“including the specific terminology used to refer to  
24 certain Hemisphere resources and personnel”); *id.* at 78, No. 26 (a Hemisphere introduction and  
request tutorial). But the *Vaughn* Index is not clear about how revealing these documents risks  
25 circumvention of the law or exposing something more than a generally known technique or  
26 procedure. The Government’s supporting declaration is also of little assistance. It notes, for  
27 instance, that some of the documents provide “[d]etails about how Hemisphere results and output  
28

1 are delivered to and presented to law enforcement, including sample results displays" (Myrick  
2 Decl. ¶ 58(g)), but it does not explain how this risks circumvention of the law or provides  
3 information about Hemisphere's capabilities (i.e., a government technique or procedure) that is not  
4 already generally known.

5 While it is tempting to make assumptions as to why the Government believes such  
6 information is protected, the Government ultimately has not provided the Court with enough  
7 support to be able to determine on a *de novo* basis whether the Government properly withheld  
8 these documents. For the most part, the Government has not provided the sort of individualized,  
9 tailored descriptions to allow the Court to find that some of these documents should or should not  
10 be protected under Exemption 7(E). *See Wiener*, 943 F.2d at 978-79. Accordingly, the  
11 Government has not provided evidence demonstrating this information was properly withheld.

12 **C. Next Steps**

13 EFF urges the Court to conduct an *in camera* review of the withheld materials if it has any  
14 doubts about releasing the documents. The Court finds this request appropriate given the findings  
15 above, as well as the Court's concerns over the Government's choices to withhold and segregate  
16 certain information in this case. Among other things, EFF provides Exhibits 9 and 10 to the  
17 Lynch Declaration. Both Exhibits contain the same slide show presentation by the Los Angeles  
18 Hemisphere Regional Center. *See Lynch Decl.*, Exs. 9-10. But the Government provided Exhibit  
19 9 with several redactions, whereas the Los Angeles Clearinghouse (which operates the Los  
20 Angeles Hemisphere Regional Center) provided EFF with Exhibit 10, the same report with far  
21 fewer redactions. For instance, in the first slide, the Government disclosed only the title  
22 ("Hemisphere monthly requests"), while the Los Angeles Hemisphere Regional Center also  
23 disclosed the number of requests. *Compare Lynch Decl.*, Ex. 9 with *id.*, Ex. 10; *see also* EFF  
24 Mot. at 19-20 (discussing same). It is not clear under what Exemption the Government withheld  
25 this information or why. While the Government asserts it used "surgical precision . . . in its word-  
26 by-word review and analysis, release-redaction decisions, and segregability analysis" (Gov't First  
27 Suppl. Resp. at 5-6, Dkt. No. 34), ultimately the vagueness and conclusory nature of the  
28 Government's supporting evidence as well as the discrepancy between Exhibits 9 and 10

1 undermines its assertion.

2 In *Hamdan*, the Ninth Circuit held that a “district court is not required to conduct an  
3 independent *in camera* review of each withholding unless an agency declaration lacks sufficient  
4 details or bears some indicia of bad faith by the agency.” 797 F.3d at 779. Under the  
5 circumstances present here, the Court finds it appropriate to review the documents the  
6 Government withheld under Exemption 7(E). *See, e.g., Andrus v. U.S. Dep’t of Energy*, 2016 WL  
7 4186917, at \*10 (D. Idaho Aug. 8, 2016) (as the government’s “*Vaughn* index and affidavits are  
8 conclusory and insufficiently detailed, the Court must conduct an *in camera* review of these  
9 documents in order to sufficiently determine whether the [Exemption] has been properly invoked,  
10 or whether further disclosure is ultimately appropriate.”). Additionally, as the Court has come to a  
11 different conclusion than the *EPIC* court on Documents 1 and 4 (withheld under Exemption 5), the  
12 Court will review these documents as for the Exemption 5 withholding in addition to their  
13 Exemption 7(E) withholding.

14 **CONCLUSION**

15 For the reasons stated above, the Court **DENIES IN PART** and **GRANTS IN PART** the  
16 Government’s Motion for Summary Judgment, and **GRANTS IN PART** and **DENIES IN PART**  
17 EFF’s Motion for Summary Judgment. The Government shall lodge copies of the documents  
18 withheld under Exemption 7(E) for *in camera* review by **January 23, 2017**. No electronic copy  
19 should be filed on the public docket; rather, the Government shall file a notice of lodging of these  
20 materials.

21 **IT IS SO ORDERED.**

22 Dated: December 22, 2016

23  
24   
MARIA-ELENA JAMES  
United States Magistrate Judge

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26  
27  
28